NO. 88-6613

IN THE SUPREME COURT OF THE UNITED STATES
Term, 1988

RICHARD BOYDE,

Petitioner,

-vs-

STATE OF CALIFORNIA,

Respondent,

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF CALIFORNIA

BRIEF AMICI CURIAE STATE OF ARIZONA, JOINED BY THE STATES OF ALABAMA, MISSOURI, MONTANA, NORTH CAROLINA, OHIO, PENNSYLVANIA AND WYOMING.

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QUESTION PRESENTED

May a death penalty instruction guide and channel the sentencer's discretion by requiring that the death penalty be imposed if the aggravating circumstances outweigh the mitigating circumstances?

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INTEREST OF AMICI CURIAE

Amici curiae are states that have adopted sentencing schemes that provide that the sentencing authority must impose a sentence of death if it determines that the aggravating circumstances outweigh the mitigating circumstances. California has a similar procedure; petitioner is asking this Court to declare that procedure unconstitutional. Amici curiae have an interest in this issue because this Court's ruling on the California procedure will affect the validity of the sentencing procedures in our states.[1]

SUMMARY OF ARGUMENT

California's jury instruction required the sentencer to impose the death penalty if it found that the

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1. This Court is presently reviewing a similar attack on Pennsylvania's death penalty statute in Blystone v. Pennsylvania, No. 88-6222.

aggravating circumstances outweighed the mitigating circumstances. This Court has held that the Eighth Amendment requires that a death penalty statute narrow the class of death penalty-eligible offenders, and that the sentencer make an individualized determination regarding the proper sentences by considering all mitigating evidence. However, contrary to petitioner's argument, this Court's cases do not require that the sentencer have "unbridled discretion" in finally determining the appropriate penalty.

Amici submit that no one system for imposing the death penalty is, or should be, preferred over any other valid system. Amici urge this Court to uphold the jury instruction given in petitioner's case, not because it is constitutionally compelled, but solely because it is not constitutionally prohibited.

ARGUMENT

THE CALIFORNIA JURY INSTRUCTION PROPERLY REQUIRED THAT THE DEATH PENALTY BE IMPOSED IF AGGRAVATING CIRCUMSTANCES OUTWEIGHED MITIGATING CIRCUMSTANCES.

Petitioner contends that the California jury instruction requiring the jurors to impose a sentence of death if they conclude that the aggravating circumstances outweigh the mitigating circumstances, creates a mandatory sentencing scheme and is thus unconstitutional. In 1976, this Court reviewed five death penalty cases. In the three cases upholding the "guided-discretion" statutes, the opinions emphasized that those schemes permitted the sentencing authority to consider relevant mitigating circumstances pertaining to the offense, and a range of factors concerning individual defendant. Gregg v. Georgia, 428 U.S. 153, 197 (1976); Proffitt v.

Florida, 428 U.S. 242, 251-52 (1976); Jurek v. Texas, 428 U.S. 262, 270-71 (1976). This Court declared two mandatory sentencing schemes unconstitutional. The opinions stressed they were fatally flawed by their failure to permit presentation of mitigating circumstances for the consideration of the sentencing authority. Woodson v. North Carolina, 428 U.S. 280, 303-05 (1976); Roberts (Stanislaus) v. Louisiana, 428 U.S. 325, 333-34 (1976). Thus, the constitutional mandate found in these capital cases is that "it is constitutionally required that the sentencing authority have information sufficient to enable it to consider the character and individual circumstances of a defendant prior to imposition of a death sentence." Sumner v. Shuman, 483 U.S. 66, ____, 107 S. Ct. 2416, 2720; Gregg, 428 U.S. at 189 n.38.

So long as the sentencing scheme meets these requirements, it is constitutional.

The jury instruction given in California is a proper application of this Court's pronouncement on permissible sentencing procedures. The instruction narrows the class of death penalty-eligible offenders and provides for consideration of all mitigating evidence, including evidence relating to the circumstances of the offense. Former Caljic 8.84.2. The instruction required the jurors to impose the death sentence if they found that the aggravating circumstances outweighed the mitigating circumstances. By allowing the jurors to consider all relevant evidence in mitigation and then instructing them to impose a sentence of death if the aggravating circumstances outweigh the mitigating circumstances, this instruction allows for the individual

consideration required, and at the same time avoids the arbitrary selection of those condemned to death that this Court rejected in Furman v. Georgia, 408 U.S. 238 (1972).

Petitioner argues that this provision of the instruction is unconstitutional because it creates a "mandatory death penalty" that precludes individualized sentencing based on the circumstances of the offense and the offender. Petitioner's argument is an unwarranted extension of this Court's jurisprudence. Once a state establishes a rational scheme for the discretionary consideration of aggravating and mitigating factors, further federal review is unnecessary. Petitioner's argument would engraft a third requirement of "unbridled discretion" for sentencers.

As recently as 1988, this Court held that the Constitution requires no more

than that death penalty statutes narrow "the class of death-eligible murderers," and then at the sentencing phase allow for the consideration of mitigating circumstances and the exercise of discretion. Lowenfield v. Phelps, __ U.S. ___, 108 S. Ct. 546, 555 (1988). This Court has never indicated that the states must guide the exercise of discretion in a certain way or, as petitioner apparently contends, permit that exercise of discretion to be unbridled. "Much in our cases suggests just the opposite." Franklin v. Lynaugh, ___ U.S. ___, 108 S. Ct. 2320, 2331 (1988) (White, J.).

Initially, it must be noted that the California jury instruction is not the type of "mandatory" scheme first condemned by this Court in Woodson v. North Carolina, 428 U.S. 280 (1976). Unlike the "mandatory" statutes

invalidated by this Court, California law permits consideration of all mitigating evidence. People v. Melton, 44 Cal. 3d 713, 761, 244 Cal. Rptr. 867, 750 P.2d 741, cert. denied, 109 S. Ct. 329 (1988). Furthermore, unlike the true "mandatory" statutes this Court denounced in Woodson, California's law is consistent with the Eighth Amendment requirement that the death penalty be imposed in a rational and non-arbitrary fashion. Furman v. Georgia, 408 U.S. 238 (1972). Prior to Furman v. Georgia, capital sentencers had unbridled discretion in determining penalty. McGautha v. California, 402 U.S. 183 (1971). However, in Furman, this Court declared such total discretion unconstitutional because it led to irrational and arbitrary results. Gregg v. Georgia, 428 U.S. 153, 188 (1976), citing Furman v. Georgia, 408 U.S. 238 (1972). Since Furman, this Court has "identified a

constitutionally permissible range of discretion in imposing the death penalty." McCleskey v. Kemp, 481 U.S. 279, 305 (1987). That permissible range falls between "a required threshold below which the death penalty cannot be imposed" and the requirement that the sentencer consider all mitigating evidence. Id. at 305-06; see also California v. Brown, 479 U.S. 538, 541 (1987).

This Court has merely indicated that it will tolerate "unbridled discretion" once a sentencer has determined that a murderer has crossed the threshold of death penalty eligibilty and has considered all mitigating evidence.

> [T]his Court has never held that jury discretion must be unlimited or unguided; we have never suggested that jury consideration of mitigating evidence must be undirected or unfocused; we have never concluded that states cannot channel jury discretion in capital sentencing in an effort to

> achieve a more rational and equitable administration of the death penalty."

Franklin v. Lynaugh, 108 S. Ct. at 2331 (White J.).

It is understandable why states choose to channel the discretion of sentencers in considering the circumstances and determining the final penalty. This Court invalidated death penalty statutes in 1972 because the sentencing procedures then in effect created a substantial risk that the death penalty would be inflicted in an "arbitrary and capricious manner." Gregg v. Georgia, 428 U.S. at 188, citing Furman v. Georgia, (emphasis added). Channeling a sentencer's discretion can serve the "useful purpose" of precluding consideration of extraneous emotional factors unrelated to the evidence. See California v. Brown, 479 U.S. at 543. Furthermore, states can ensure that the

death penalty will be imposed "with regularity," rather than "freakishly or rarely." Proffitt v. Florida, 428 U.S. 242, 260 (1976) (White, J. concurring); Jurek v. Texas, 428 U.S. 262, 278-79 (1976) (White, J. concurring). The channeling of sentencer discretion can "minimize the risk of wholly arbitrary and capricious action." Gregg v. Georgia, 428 U.S. at 189. Such schemes promote the rational and predictable administration of death penalty laws. California v. Brown, 479 U.S. at 541. Standards for the consideration of all evidence provide a "meaningful basis for distinguishing the few cases in which the [death penalty] is imposed from the many cases in which it is not." Furman v. Georgia, 408 U.S. at 238 (White, J. concurring). They also foster reliability in further judicial review. California v. Brown, 479 U.S. at 543.

These schemes do not sacrifice the requirement that death sentencing be individualized because they do not preclude the admission and consideration of any relevant mitigating evidence. As a practical matter, sentencers will be aware of the consequences of their weighing of the aggravating and mitigating circumstances. Franklin v. Lynaugh, 108 S. Ct. at 2331 n.12 (White, J.). The "weighing" process does not eliminate subjectivity, but it does set "clear and objective" standards to minimize discrimination. Gregg v. Georgia, 428 U.S. at 189, 198.

Finally, these "weighing" statutes resolve any "tension" that may exist between the Eighth Amendment requirements that the death penalty be imposed in a rational manner, and that the sentencer consider all potential mitigating evidence. Franklin v. Lynaugh,

108 S. Ct. at 2331 (White, J.), citing California v. Brown, 479 U.S. at 544 (O'Connor, J. concurring). Since these statutes do not preclude consideration of any mitigating evidence, they protect the Eighth Amendment interest by ensuring that the death penalty is "appropriate" in a particular case. Woodson v. North Carolina, 428 U.S. at 305 (Stewart, J.). Yet, by requiring that the death penalty then be imposed if the aggravating circumstances outweigh mitigating circumstances, these statutes also promote the Eighth Amendment requirement that the capital sentencing decision be a "reasoned moral response" to the evidence. Penry v. Lynaugh, ___ U.S. ___, 57 U.S.L.W. 4958, 4965 (1989).

In Proffitt v. Florida, this Court approved a statute that required imposition of the death penalty if the aggravating circumstances outweighed the

mitigating circumstances. Florida has interpreted its statute as compelling a death judgment in the absence of mitigating circumstances. Barclay v. Florida, 463 U. S. 939, 961-62 (1983) citing Cooper v. State, 336 S.2d 1133, 1142 (Fla. 1976), cert. denied, 431 U.S. 925 (1977) (Stevens, J. concurring); see also Woodson v. North Carolina, 428 U.S. 280, 315 (1976) (Rehnquist, J. dissenting); Roberts v. Louisiana, 428 U.S. 325, 362 n.8 (1976) (White, J. dissenting). The concurrence in Proffitt praised the Florida statute because it "required" the sentencer to impose the death penalty if aggravating circumstances outweighed mitigating circumstances. Proffitt v. Florida, 428 U.S. at 260-61 (White, J. concurring). When this Court again approved Florida's statute in Barclay v. Florida, that state still interpreted its statute as establishing a

rebuttable "presumption" of death. Barclay v. Florida, 463 U.S. at 961-62 citing Williams v. State, 386 S.2d 538, 543 (Fla. 1980) (Stevens, J. concurring).

This Court has likewise approved the Texas death penalty scheme. Jurek v. Texas, 428 U.S. 262 (1976). That statute required that the death sentence be imposed if the sentencer answered three questions about the defendant in the affirmative. This Court approved the statute because it narrowed the class of death penalty-eligible murderers and because it permitted the sentencer to consider all mitigating circumstances. 428 U.S. at 270-76 (Stewart, J.). The concurrence in Jurek noted that the sentencer "must" impose the death penalty if it answered the questions affirmatively and that the statute did "not extend to juries discretionary power to dispense mercy. . . ." 428 U.S. at 279 (White, J.

concurring); see also Woodson v. North Carolina, 428 U.S. at 315 (Rehnquist, J. dissenting); Roberts v. Louisiana, 428 U.S. at 359 (White, J. concurring). Franklin v. Lynaugh, reaffirmed the constitutionality of Texas' death penalty scheme on the assumption that the statute permitted consideration of all mitigating evidence. 108 S. Ct. at 2330-32 (O'Connor, J. concurring).[2]

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2. This Court's recent opinion in Penry v. Lynaugh, ___ U.S. ___, 57 U.S.L.W. 4958 does not affect this analysis. In Penry, this Court merely held that Texas juries must be permitted to consider and give effect to mitigating evidence without being restricted by the three "special issues" that Texas juries must answer affirmatively to impose the death penalty. Penry is no more than an extension of the line of cases beginning with Jurek v. Texas, and Woodson v. North Carolina, that require sentencers to consider and give independent weight to all relevant mitigating evidence in order to ensure that the death penalty is "appropriate." That, of course, is a question separate from the one presented in this case -- whether states may guide and channel the decision that follows the consideration of that evidence. In fact, this Court merely held "there is no constitutional infirmity in a procedure that allows a jury to recommend mercy

Taking their cue from this Court, many states have chosen to follow the approach of channeling and guiding the sentencer's consideration of aggravating and mitigating circumstances. For instance, Arizona law requires imposition of the death penalty if the sentencer (the trial judge) finds one aggravating factor and no mitigating factors substantial enough to call for leniency. Ariz. Rev. Stat. Ann. § 13-703(E). The Arizona courts have interpreted this formula as requiring the imposition of the death sentence if aggravating circumstances qualitatively outweigh mitigating circumstances. State v.

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based on the mitigating evidence." 57 U.S.L.W. at 4964. Once again, this Court is merely indicating that it will tolerate such discretion. Penry must be analyzed in the context of the peculiar Texas statute. Its holding cannot be extended to other states, such as California, which already permit full consideration of all mitigating evidence.

Gretzler, 135 Ariz. 42, 659 P.2d 1, 13-14, cert. denied, 461 U.?S. 971 (1983). This requirement means that "a defendant will stand the same chance of receiving the death penalty from a judge who does not philosophically believe in the death penalty as from a judge who does." State v. Beaty, 158 Ariz. 232, 762 P.2d 519, 534 (1988), cert. denied, 109 S. Ct. 3200 (1989). Thus, the death penalty "is then reserved for those who are above the norm of first-degree murderers or whose crimes are above the norm of first-degree murders, as the legislature intended." (Id.)[3]

New Jersey mandates a death penalty if the aggravating factors outweigh

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3. The Arizona death penalty formula was declared unconstitutional by the Ninth Circuit in Adamson v. Ricketts, 865 F.2d 1011 (9th Cir. 1988). Arizona's petition for writ of certiorari is currently pending before this Court in Ricketts v. Adamson, (No. 88-1553).

mitigating factors. However, such a law is "hardly the automatic imposition of death found unconstitutional in [Woodson] . . . ." since New Jersey law permits consideration of all mitigating factors. State v. Price, 195 N.J.Super 285, 478 A.2d 1249, 1254-1255 (1984). The New Jersey courts have noted that this Court has never required a so-called "mercy" provision. Id. New Jersey has rejected the argument that the jurors should also decide explicitly that death is the "appropriate" penalty since the vagueness of that term would "undermin[e] the principle, also constitutionally mandated, that the death sentence be meted out in a manner that is not arbitrary or capricious." State v. Ramseur, 106 N.J. 123, 524 A.2d 188, 287 n.81 (1987).

Illinois requires imposition of the death penalty if there are no mitigating

factors sufficient to preclude that punishment. This finding "is synonymous with a finding that death is the appropriate penalty." People v. Montgomery, 122 Ill. 517, 494 N.E.2d 475, 482 (1986), cert. denied, 479 U.S. 1101 (1987).

Maryland courts have also rejected the argument that jurors should be instructed that they may impose a life sentence without regard to the relative weights of aggravating and mitigating factors. Otherwise, "there would be no principled or rational way to differentiate the few cases in which the death penalty is justified from the many in which it is not." People v. Tichnell, 306 Md. 428, 509 A.2d 1179, 1999, cert. denied, 479 U.S. 995 (1986). Such an instruction would permit "unguided discretion." Grandison v. State, 305 Md. 685, 506 A.2d 580, 616, cert. denied, 479 U.S. 873 (1986).

Ohio requires the jurors to recommend the death penalty to the court if aggravating factors outweigh mitigating factors beyond a reasonable doubt. Since Ohio law permits the introduction of any relevant mitigating factors, Ohio courts have found that this system comports with the Eighth Amendment. State v. Jenkins, 15 Ohio St.3d 164, 473 N.E.2d 264, 280-281 (1984), cert. denied, 472 U.S. 1032 (1985), discussing Barclay v. Florida, 463 U.S. at 958 (Stevens, J. concurring).

Tennessee has upheld its analogous death penalty law, since its statute requires the sentencer to consider all mitigating factors. State v. Dicks, 615 S.W.2d 126, 131 (Tenn.), cert. denied, 454 U.S. 933 (1981).

The Pennsylvania Supreme Court in Commonwealth v. Peterkin, 513 A.2d 373, 387-88 (Penn.), cert. denied, 479 U.S. 1070 (1986), held that the channelling of

considerations of mercy and leniency into a scheme of aggravating and mitigating circumstances was consistent with Furman. By limiting the discretion of the sentencing body, the court found the Pennsylvania sentencing scheme minimized the risk of wholly arbitrary and capricious action. Commonwealth v. Peterkin, 513 A.2d at 388; see also Commonwealth v. Blystone, 549 A.2d 81 (Penn. 1988), cert. granted, 109 S. Ct. 1567 (1989).

The State of Washington requires that the death penalty be imposed if "there are not sufficient mitigating circumstances to merit leniency." State v. Jeffries, 105 Wash.2d 398, 717 P.2d 722, 737 (1986). Washington has rejected the argument that this statute imposes a "mandatory" death penalty in violation of Woodson, since the statute allows for jury discretion in considering all mitigating factors. However, once the

jurors have exercised that discretion, "[i]t is only at this point that the death penalty becomes mandatory. . . . The result is that the penalty of death is not arbitrarily or capriciously imposed, but instead is imposed in a just manner." 717 P.2d at 738; see also Campbell v. Kincheloe, 829 F.2d 1453, 1466 (9th Cir. 1987), cert. denied, 102 L. Ed. 2d 369 (1988).

Montana's law is similar to Washington's in requiring a death penalty if there are no mitigating circumstances sufficiently substantial to call for leniency. People v. Coleman, 605 P.2d 1000, 1016 (1979), cert. denied, 446 U.S. 970 (1980). However, Montana has held that such a scheme is not an unconstitutional mandatory statute, since Montana's statute requires its sentencers to consider all facts existing in mitigation. 605 P.2d at 1017; see also McKenzie v. Risley, 842 F.2d 1525, 1543

(9th Cir.), cert. denied, 109 S. Ct. 250 (1988).

These states have chosen, along with California, to provide guidance and direction to its sentencers. Nothing in this Court's precedents militates against that choice. Indeed, an analysis of this Court's decisions indicates that the Eighth Amendment encourages these states' choice of action.

To argue that California's jury instruction is unconstitutional, petitioner twists this Court's jurisprudence inside out. He transforms permission to have "unbridled discretion" into a prohibition of any channelization of sentencer discretion whatsoever. In doing so, he advocates that a third federal requirement be added that would mandate that the sentencing discretion be unbridled, and to do so would preclude legitimate state efforts to direct and

guide sentencers in a rational and equitable fashion.[4]

This Court has long recognized the limited and specific nature of its responsibility when reviewing a capital punishment scheme. Gregg v. Georgia, 428 U.S. at 195. Amici expect that whatever the Court's decision in this case, it will generate renewed attacks on each of the statutory schemes authorizing

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4. The Amicus brief filed on behalf of petitioner emphasizes the problem with a statutory scheme that allows for "unbridled discretion." Petitioner's Amicus proudly boasts that in Alameda County, California, in over half of the cases where the jurors found that the aggravating circumstances outweighed the mitigating circumstances and were allowed unbridled discretion, the jurors elected to impose life. Such evidence supports the position of respondent. If the jurors consider all relevant mitigation and determine that it does not outweigh the aggravating circumstances proved by the state, the imposition of a life sentence is either an arbitrary decision in violation of Furman, or based on the inappropriate consideration of irrelevant mitigation (i.e. race of accused, race of the victim, social status of the victim, etc.) in violation of California v. Brown, 479 U.S. at 543.

the death penalty. We urge the Court, therefore, not only to uphold the sentencing scheme in California, but also to reaffirm the position it took in Pulley v. Harris, 465 U.S. 37, 45 (1984): to endorse the principle as a whole "is not to say that anything different is unacceptable."

CONCLUSION

Amici curiae request this Court to affirm the judgment of the Supreme Court of the State of California.

Respectfully submitted,
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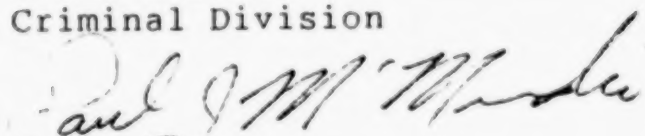

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